UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., a corporation, and BORDEN, INC., a corporation.	DOCKET NO.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent The Great Atlantic & Pacific Tea Company, Inc. (hereinafter referred to as A & P), has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Section 45) and the provisions of subsection (f) of Section 2 of the Clayton Act (15 U.S.C. Section 13f) as amended by the Robinson-Patman Act, approved June 19, 1936, and that respondent Borden, Inc. (hereinafter referred to as Borden), has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Section 45), and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint charging as follows:

COUNT I

PARAGRAPH ONE: Respondent A & P is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its principal office and place of business located at 420 Lexington Avenue, New York, New York 10017.

PARAGRAPH TWO: Respondent A & P is now, and for many years has been engaged in the operation of a large chain of retail grocery stores. There are presently more than 4500 stores operated by respondent in 34 states of the United States, the District of Columbia and in Canada. Respondent A & P also operates a number of plants for the manufacture and processing of food and other products handled in its stores, including plants which process and manufacture milk and other dairy products. A & P's annual sales for the fiscal year ended February 22, 1969, totalled over $5,436,325,000.00 and for the fiscal year ended February 28, 1970, they totalled $5,753,692,000.00.

Included among A & P's retail grocery chain stores are approximately 260 or more stores located in the States of Illinois (including the Chicago metropolitan area), Indiana and Iowa, which stores comprise the Chicago Division of A & P. This Division was formerly identified as the Chicago Unit of A & P's Middle Western Division.

PARAGRAPH THREE: In the course and conduct of its business, respondent A & P has been and is now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and the amended Clayton Act. In the course of that commerce A & P has been purchasing grocery and household products, including milk and other dairy products, for resale within the United States, from sellers also engaged in "commerce," as commerce is defined in the Federal Trade Commission Act and the amended Clayton Act.

In connection with such transactions, A & P is now, and has been, in active competition with other corporations, partnerships, firms and individuals also engaged in the purchase for resale and resale of grocery and household products, including milk and other dairy products, of like grade and quality which are purchased from the same or competitive sellers.

The aforesaid sellers are located in the various states of the United States, and respondent A & P and such sellers cause the products when purchased by said respondent, to be transported from the place of processing, manufacture or purchase, to A & P's retail stores and warehouses located in the same state and various other states of the United States. Further, in many instances the sellers must purchase or obtain raw materials, supplies and finished products from states other than the state in which such products are processed, manufactured or purchased as aforesaid, in order to fulfill the obligations of said sellers in their commitments to supply respondent A & P.

PARAGRAPH FOUR: Respondent Borden (formerly The Borden Co.) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 350 Madison Avenue, New York, New York 10017.

PARAGRAPH FIVE: Respondent Borden is a holding and operating company having on December 31, 1969, a 100% voting power in approximately 22 subsidiary corporations.

Respondent Borden has approximately 200 plants in the United States and Canada that are managed by four operating divisions. A diversified dairy business, including virtually all branches thereof, is conducted by Borden's Dairy and Services Division (formerly the Milk and Ice Cream Division). For this division, Borden's chief trade name is "Borden."

Respondent Borden owns, maintains and operates a large number of receiving stations, processing and manufacturing plants and distribution depots located in various states of the United States from which it sells and distributes its said products to purchasers.

Borden's net sales amounted to approximately $1,740,184,687.00 in 1969 and approximately $1,827,341,000.00 in 1970.

PARAGRAPH SIX: Respondent Borden sells milk and other dairy products of like grade and quality to a large number of purchasers located throughout the states of the United States, including the States of Illinois, Indiana and Iowa, for use, consumption or resale therein.

PARAGRAPH SEVEN: In the course and conduct of its business, respondent Borden is now, and for many years past has been, transporting raw milk, or causing the same to be transported, from dairy farms and other points of origin to said respondent's receiving stations, processing and manufacturing plants and distribution depots located in states other than the state of origin.

Respondent Borden is now, and for many years past has been, transporting milk and other dairy products, or causing the same to be transported, from the state or states where such products are processed, manufactured or stored in anticipation of sale or shipment to purchasers located in other states of the United States.

Respondent Borden also sells and distributes its said milk and other dairy products to purchasers located in the same states and places where such products are manufactured or stored in anticipation of sale.

All of the matters and things, including the acts, practices, sales and distribution by respondent Borden of its said milk and other dairy products, as hereinbefore alleged, were and are performed and done in a constant current of commerce, as "commerce" is defined in the Federal Trade Commission Act.

PARAGRAPH EIGHT: Respondent Borden sells its milk and other dairy products to retailers. Borden's retailer-purchasers resell to consumers. Many of said respondent's retailer-purchasers are in competition with other retailer-purchasers of Borden.

PARAGRAPH NINE: In the course and conduct of its business in commerce, respondent A & P has entered into an agreement with respondent Borden for the supply of milk and other dairy products, packaged under A & P's own private label, to the majority of the stores of A & P's Chicago Division (Chicago Unit at the time of initiation of the agreement). At the time Borden tendered its final offer to A & P, the offer which was accepted to form the said agreement, Borden informed respondent A & P that the offer was being granted for the purpose of meeting competition in the form of an existing offer or offers which A & P then had in its possession. A & P accepted the said offer of Borden with knowledge that Borden had granted a substantially lower price than that offered by the only other competitive bidder and without notifying Borden of this fact.

By the term private label, it is meant that such products were packaged under labels bearing brand names owned by A & P or peculiar to the retail operations of A & P, its divisions and subsidiaries, rather than under labels displaying brand names owned by Borden or peculiar to the operations of Borden.

PARAGRAPH TEN: The aforegoing act and practice of respondent A & P violates the policy of Section 2 of the Clayton Act, as amended, is to the prejudice of the public and constitutes an unfair method of competition in commerce and an unfair act or practice in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act. (15 U.S.C., Section 45).

Count II

PARAGRAPH ELEVEN: Paragraphs One through Ten of Count I hereof are hereby set forth by reference and made a part of this count as fully and with the same effect as if quoted herein verbatim.

PARAGRAPH TWELVE: In the course and conduct of its business in commerce, respondent A & P has knowingly induced or received discriminations in price which are prohibited by subsection (a) of Section 2 of the Clayton Act, as amended.

Respondent A & P, in its negotiations with respondent Borden, before and after November 1, 1965, for the supply of milk and other dairy products under private label to the stores of A & P's Chicago Unit (now Division), knowingly induced prices which were and are discriminatory under the provisions of Section 2 of the amended Clayton Act. Further, respondent A & P has knowingly induced or received prices from Borden in the purchase of such products for said stores which said prices were and are discriminatory under the provisions of Section 2 of the amended Clayton Act.

PARAGRAPH THIRTEEN: When respondent A & P knowingly induced or received the discriminatory prices from its supplier, as alleged, A & P knew or should have known that such prices constituted discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

PARAGRAPH FOURTEEN: The aforegoing acts and practices of A & P are in violation of subsection (f) of Section 2 of the Clayton Act, as amended.

Count III

PARAGRAPH FIFTEEN: Paragraphs One through Thirteen of Counts I and II hereof are hereby set forth by reference and made a part of this count as fully and with the same effect as if quoted herein verbatim.

PARAGRAPH SIXTEEN: During the negotiations and dealings between respondents, before and after November 1, 1965, there developed a course of conduct to be followed by respondents. Pursuant thereto, A & P, for its part, introduced and sold private label milk and other dairy products at the prevailing retail price level for vendor label milk and dairy products, in spite of the fact that it was paying as much as 11 cents per gallon less for private label milk than it was paying for vendor (Borden) label milk. Thus, for its part in said course of conduct, A & P sustained and maintained existing retail prices for milk and other dairy products, and did not pass on to the consuming public any of the substantial price savings on private label milk and other dairy products which it received by reason of the wholesale price given it by Borden.

Further, pursuant to said course of conduct, Borden, for its part, failed to pass on, at the wholesale level, price reductions, similar to the reductions granted to A & P, to other purchasers who compete with A & P in the market areas covered by A & P's Chicago Unit (now Division).

The foregoing course of conduct constitutes a combination between respondents which had the tendency or effect of stabilizing and maintaining prices for milk and other dairy products. Said combination had the further effect of permitting A & P to retain the substantial monetary and competitive benefits of the discriminatory price advantage which it had obtained as a result of its private label agreement with Borden.

PARAGRAPH SEVENTEEN: The aforegoing acts and practices of respondents A & P and Borden are to the prejudice of the public and constitute unfair methods of competition in commerce and unfair acts or practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act. (15 U.S.C., Section 45).

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this day of , A. D., 1971, issues its complaint against respondent.

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the day of A.D. 19 , at o'clock is hereby fixed as the time and

as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the hearing examiner, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

Further, pursuant to said course of conduct, Borden, for its part, failed to pass on, at the wholesale level, price reductions, similar to the reductions granted to A & P, to other purchasers who compete with A & P in the market areas covered by A & P's Chicago Unit (now Division).

The foregoing course of conduct constitutes a combination between respondents which had the tendency or effect of stabilizing and maintaining prices for milk and other dairy products. Said combination had the further effect of permitting A & P to retain the substantial monetary and competitive benefits of the discriminatory price advantage which it had obtained as a result of its private label agreement with Borden.

PARAGRAPH SEVENTEEN: The aforegoing acts and practices of respondents A & P and Borden are to the prejudice of the public and constitute unfair methods of competition in commerce and unfair acts or practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act. (15 U.S.C., Section 45).

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You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the hearing examiner, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed provisions as to The Great Atlantic & Pacific Tea Company, Inc., and Borden, Inc., might be inadequate fully to protect the consuming public, or the competitive conditions of the retail grocery or dairy industries, the Commission may order such other relief as it finds necessary or appropriate, including restrictions on specific abuses of buying power in bi-lateral negotiations, restrictions on the use of the competitive bidding process, requirements that special price reductions be passed on to the consumer and to competing retailer - purchasers, the posting or publication of net wholesale prices to A & P, and restriction of vertical integration by A & P into the dairy industry if it appears any such provision is necessary or desirable for effective relief herein.

IT IS ORDERED that respondent The Great Atlantic & Pacific Tea Company, Inc., a corporation, directly or through any corporate or other device, in, or in connection with the offering to purchase or purchase of any product, including fluid milk and other dairy products, in commerce, as "commerce" is defined in the amended Clayton Act, for resale in outlets operated by respondent, forthwith cease and desist from directly or indirectly inducing, receiving or accepting from any seller a net price respondent knows or should know is below the net price at which said products of like grade and quality are being sold by such seller to other purchasers where respondent is competing with the purchaser paying the higher price or with a customer of the purchaser paying the higher price, unless said respondent shows that it knew or had reason to believe that the price difference in its favor was cost justified on the basis of the differing methods or quantities in which it purchases such product, or said price was granted to it by the supplier to meet a lawful, equally low price of a competitor.

For the purpose of determining the "net price" under the terms of this order, there shall be taken into account all discounts or other terms and conditions of sale by which net prices are effected.

IT IS FURTHER ORDERED that respondent The Great Atlantic & Pacific Tea Company, Inc., a corporation, directly or through any corporate or other device, in, or in connection with the purchase and resale of any product, including fluid milk and other dairy products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from directly or indirectly entering into a combination, agreement or conspiracy which has the tendency or effect of fixing, stabilizing, maintaining, or sustaining the price of such product in any market area, at any market level.

IT IS FURTHER ORDERED that respondent Borden, Inc., a corporation, directly or through any corporate or other device, in, or in connection with the sale of fluid milk or other dairy products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from directly or indirectly entering into a combination, agreement or conspiracy which has the tendency or effect of fixing, stabilizing, maintaining, or sustaining the price of such product in any market area, at any market level.

IT IS FURTHER ORDERED that each respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation, which may affect its compliance obligations arising out of the order.

IT IS FURTHER ORDERED that each respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied and will comply with this order.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this day of , A. D., 1971.

By the Commission.

S E A L

Charles A. Tobin,
Secretary.